United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT SHERIDAN,

Plaintiff,

against

GASPARE DiGIORGIO, LPI TRANSPORT CORP. and PEPSI-COLA, INC.,

Defendants and Third-Party Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

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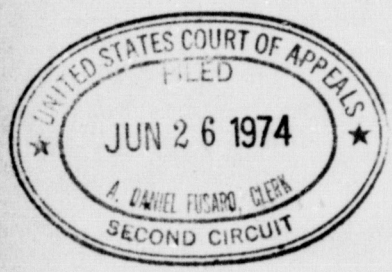
BRIEF FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS



LARKIN, WRENN & CUMISKY
Attorneys for Defendants and Third-Party Plaintiffs-Appellants
11 Park Place
New York, New York 10007

TABLE OF CONTENTS

	PAGE
ISSUES	1
FACTS	2
STATUTES	6
POINT I—The appellants are entitled to pursue their remedy of indemnification against the United States in this action	8
POINT II—If the appellants were not entitled to claim indemnification from the United States, they should be allowed contribution in some form as meets the ends of justice	14
CONCLUSION	20

Cases Cited

Anderson v. Liberty Fast Freight Co., 285 App. Div. 44	10
Atella General Electric, 21 F.R.D. 372	12
Bounougias v. Republic Steel Corp., 277 F. 2d 726 (7th Cir. 1960)	12
Brown v. Rosenbaum, 287 N. Y. 510 (1942), cert. den. 316 U. S. 689	8
Burris v. American Chicle Co., 120 F. 2d 218 (2nd Cir. 1941)	12
Carr v. United States, 422 F. 2d 1007 (1970)	15-17
Dawson v. Contractors Transportation Corp., 467 F. 2d 727 (1972)	19
Dole v. Dow Chemical Co., 30 N. Y. 2d 143 (1972)	8, 9, 14, 15, 19

PAGE

Jackson v. Associated Dry Goods Corp., 13 N. Y. 2d 112 (1963) 9

McFall v. Compagnie Maritime Belge, 304 N. Y. 314 8, 9

Murray v. United States, 405 F. 2d 1361 (1968) 19

Rappa v. Pittston Stevedoring Corporation, 48 F. Supp. 911 12

Rogers v. Dorchester Associates, 32 N. Y. 2d 553 (June, 1973) 9

Sanches v. Hertz Corporation, 70 Misc. 2d 449 10

Travelers Insurance Company v. United States, 493 F. 2d 881 ..... 11, 13, 19

Treadwell Construction Company v. United States, 372 U. S. 772 (1963) 13, 18

United States v. Yellow Cab Co., 340 U. S. 543 (1951) .. 13, 16

Union Stock Yards Co. of Omaha v. Chicago, Burlington and Quincy Railroad Company, 196 U. S. 217 (1905) 8

Wallenius Bremen v. United States, 409 F. 2d 994 (4th Cir. 1969) 13, 19

Wattecamps v. Artkraft Straus Sign Co., 75 Misc. 2d 934 10

Westchester Lighting Co. v. Westchester C.S.E. Corp., 278 N. Y. 175 12

Weyerhaeuser Steamship Company v. United States, 372 U. S. 597 (1963) 13, 18

Whitmarsh v. Durastone Co., 122 F. Supp. 806 12

Statutes Cited

Civil Practice Law and Rules of the State of New York:

Sec. 1401 ..... 7, 9

PAGE

Driver's Act 16, 18

Federal Rules of Civil Procedure:

12(d) 5

54(b) 6

5 U.S.C. (Federal Employers Compensation Act) .. 5

Sec. 8116 (c) 5, 6, 11-19

Sec. 8132 16

Federal Workmen's Compensation Act 18

28 U.S.C.:

Sec. 1345 (b) 5

Sec. 1346 (b) 8, 11, 13, 14, 17, 18

Sec. 2674 ..... 8, 10, 13, 14, 17

Sec. 2678 ..... 17, 18

Sec. 2678 (b) 17, 18

Sec. 2679 15

Sec. 2679 (a) 5

Sec. 2679 (b) 6, 15, 16

Vehicle and Traffic Law of the State of New York:

Sec. 388 10

Workmen's Compensation Law of the State of New York:

Sec. 11 ..... 7, 11

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BRIEF FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS

Issues

Whether the third-party plaintiffs-appellants are entitled to a cause of action for indemnity against the United States in this action.

Whether, if not entitled to indemnity, the third-party plaintiffs-appellants should be allowed to pursue a third-party action for contribution in some form against the United States.

Facts

This action was commenced in the Supreme Court of the State of New York, County of Kings. In his complaint the plaintiff alleged that on December 22, 1971 at about 11:00 a.m. when he was a passenger in a Rambler motor vehicle owned by the United States Government and when said vehicle was on the Van Dam Street eastbound exit of the Long Island Expressway, it was in collision with a Mack truck which was owned by LPI Transport Corp. (hereinafter called LPI), in the business of Pepsi-Cola, Inc. and driven by Gaspare DiGiorgio with the permission of LPI and Pepsi-Cola, Inc. It was further alleged that the accident and plaintiff's injuries incurred therein were solely the result of the negligent operation, ownership, maintenance and control of the Mack truck without any negligence of the plaintiff contributing thereto (3a-5a)*. All of the allegations were controverted by the defendants except that defendant DiGiorgio was driving the truck with permission (6a).

Plaintiff asserted in his bill of particulars that at the time of the accident he was a Management Trainee for the Department of Health, Education and Welfare in Washington, D.C. (11a).

The defendants served a third-party complaint on Robert Cooper and the plaintiff Robert Sheridan, alleging that they were both employed by the United States Food and Drug Administration and, alternatively, that they were and were not acting within the scope of their employment when the subject accident occurred. It was further alleged that the Rambler automobile in which the plaintiff was a passenger at the time of the subject accident was owned by the United States Government and that the

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* (Figures in parentheses refer to page numbers of Appendix.)

said Rambler was then operated by Robert Cooper either in his own right or in a joint venture with Robert Sheridan or under the supervision and control of Robert Sheridan in the course of their employment. The third-party complaint claimed that the plaintiff's accident was the result of the primary and active negligent operation by the third-party defendants of the aforesaid Rambler. Upon that basis defendants demanded that the ultimate rights as between the third-parties plaintiffs and the third party defendants be determined and that the third parties plaintiffs have judgment over against the third party defendants for all or part of any judgment rendered against them and in favor of plaintiffs (16a-19a). Third-party defendant Robert Sheridan joined issue with an answer to the third-party complaint (26a-27a).

On December 29, 1972, the United States Attorney's office made a petition only in reference to Robert Cooper in the United States District Court for the Eastern District of New York for removal of that part of the third-party action in which Gaspare DiGiorgio, LPI and Pepsi-Cola, Inc. sued Robert Cooper in that Court on the certification and ground that the third-party defendant was an employee of the United States Government and acting within the scope of his employment at the time of the accident (21a-22a). The Court granted the order of removal and further ordered the substitution of the United States only for third-party defendant Robert Cooper (28a-30a) despite the fact that defendants-third-party plaintiffs had opposed the petition, asserting that the removal and substitution was only sought as to one of the third-party defendants, namely Robert Cooper, whereas both he and Robert Sheridan were third-parties defendants in the action (23a-24a).

On June 8, 1973 the attorney for plaintiff Robert Sheridan in the primary action, to which the removed third-

party action was related, moved to have the entire action removed to the United States District Court (34a-37a). The United States Attorney responded to this motion with a letter to the Presiding Judge, Hon. Anthony J. Travia, specifically giving notice that it made no stipulation for removal other than for the third-party action against Robert Cooper (38a).

On September 14, 1973 the United States Attorney moved to amend its answer to the third-party complaint, again with the United States answering only for Robert Cooper (43a), to interpose the affirmative defense of Workmen's Compensation and failure of the third-party plaintiffs to file a notice of claim pursuant to the Federal Tort Claims Act (39a-40a). In that amended answer the United States admitted that both Sheridan and Cooper were its employees, acting within the scope of their employment, that it owned the automobile which they occupied at the time of the accident and that Cooper was operating it under Sheridan's supervision (43a-44a).

The United States District Court for the Eastern District entered an order in conformity with a stipulation of the parties that the entire action be removed to the United States District Court for the Eastern District of New York with the United States of America being substituted only for third-party defendant Robert Cooper on the certification of the United States Attorney that he alone, of the two third-parties defendant, was a United States employee acting within the scope of his authority at the time of the subject accident and that the caption of the action was accordingly changed to include the United States and Robert Sheridan as third-parties defendants therein (52a-54a).

Then the United States Attorney for the Eastern District of New York also certified that Robert Sheridan was acting within his authority at the time of the accident

(57a-58a) and interposed an amended answer to the third-party complaint only on behalf of United States of America in which it admitted that it owned the Rambler involved in the accident and that Cooper, its operator, and Sheridan, an occupant, were its employees, but denied that its or their negligence caused the accident (66a). That answer set up the affirmative defense of 5 U.S.C. 8116 (c) (67a). The Government further moved for a partial summary judgment dismissing Robert Sheridan as third-party defendant on the gratuitous assertion of the United States Attorney that said Robert Sheridan was neither engaged in a joint venture at the time of the accident nor was operator of the vehicle under his control or supervision. The alternative grounds offered for this relief was that 28 U.S.C. 2679(a) and 28 U.S.C. 1345 (b) precluded indemnity or contribution on the third-party complaint since the injury resulted from the operation of a government vehicle by the alleged negligence of its driver acting within the scope of his employment (59a-60a). The third-party plaintiffs opposed that motion (62a-65a) and moved for a partial summary judgment in their favor dismissing the affirmative defense of the United States in its amended third-party answer which claimed that the third-party complaint does not state a cause of action since the exclusive liability of the United States is under the Federal Employers Compensation Act, 5 U.S.C. 8116 (c) (68a-72a).

A Rule 12(d), Federal Rules of Civil Procedure, hearing was conducted by the Court (72a-73a).

In his decision and order Honorable Anthony J. Travia succinctly stated the issue before the Court as:

> "• • • whether a cause of action for indemnity or contribution exists against the United States, as third-party defendant, where the injured plaintiff is a government employee." (76a)

The Court held that any claim for contribution against the United States in this action would be violative of the provisions of the Federal Employees Compensation Act which exempts the United States from direct civil actions for damages to its employees for injuries sustained in the course of employment, since contribution is premised on the theory of remedy between joint tortfeasors (77a-81a). The Court also held that the third-party plaintiffs were not entitled to indemnity since there was no independent contractual duty owed them and potentially breached by the United States to form the foundation for such a cause of action (80a-82a). The Court, therefore, granted summary judgment to the United States, dismissing the third-party action herein against it, and denied the motion of the third-party plaintiffs for partial summary judgment against the United States (82a-83a). That order was later certified under Rule 54(b) of the Federal Rules of Civil Procedure as a final judgment (87a).

Statutes

28 U.S.C. 2679 (b)

> The remedy by suit against the United States as provided by Section 1346 (b) of this title for damages to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

5 U.S.C. 8116 (c) provides:

> "The liability of the United States or any instrumentality thereof under this sub-chapter or any ex-

tension thereof under this sub-chapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin or any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death *in a direct judicial proceeding,* in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However this subdivision does not apply to a master or a member of a crew of a vessel." (emphasis added)

Section 11 of the Workmen's Compensation Law of the State of New York states:

"The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representative, husband, parents, dependents or next of kin, or anyone otherwise on account of such injury or death * * *."

Section 1401 Civil Practice Law and Rules of the State of New York:

"Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro-rata share shall be entitled to contribution from other defendants with respect to the excess paid over and above his pro rata share: provided however, that no defendant shall be compelled to pay to any other such defendant an amount greater than this own pro rata

> share of the entire judgment. Recovery may be had in a separate action or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action."

28 U.S.C. 2674 states that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances and, under 28 U.S.C. 1346 (b), the United States District Courts have exclusive jurisdiction of actions where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the acts or omissions occurred.

POINT I

The appellants are entitled to pursue their remedy of indemnification against the United States in this action.

The concept of indemnification among joint tort-feasors has long been recognized as a remedy in the Federal and State judicial systems (*Union Stock Yards Co. of Omaha* v. *Chicago, Burlington and Quincy Railroad Company,* 196 U.S. 217, 224 (1905); *McFall* v. *Compagnie Maritime Belge,* 304 N.Y. 314, 327-328). The basis for this relief derives from the judicially conceived implied contract in laws afforded to one joint tort-feasor who has discharged the duty owed to a plaintiff which should have been paid by another because of the breach of an independent duty owed by the indemnitor to the indemnitee (*Brown* v. *Rosenbaum,* 287 N.Y. 510, 518, 519 (1942), cert. den. 316 U.S. 689). Before the advent of *Dole* v. *Dow Chemical Co.,* 30 N.Y. 2d 143 (1972), the right of indemnity in negligence actions was limited to the recovery of total indemnifica-

tion by a passive tort-feasor as against the active tort-feasor or by the defendant secondarily responsible against the one primarily responsible (*McFall* v. *Compagnie Maritime Belge* [supra]; *Jackson* v. *Associated Dry Goods Corp.*, 13 N.Y. 2d 112, 116-117 [1963]). The *Dole* v. *Dow* decision altered the substance of this principle only to the extent that it replaced the archaic "active-passive" and "primary-secondary" and the "total or nothing" right of indemnity standards with remedy of recovery of indemnity by one tort-feasor against the other tort-feasor in proportion to the extent to which their respective fault bears to the total recovery by the plaintiff (*Dole* v. *Dow* [supra] p. 153).

It is respectfully submitted that *Dole* v. *Dow* did not substitute contribution for indemnity. While the Court of Appeals of the State of New York had the authority to judicially alter the format of the law of indemnity, the law of contribution can only be created, changed or eliminated by statute.

> "The right of indemnity as distinguished from contribution is not dependent upon the legislative will." (*McFall* v. *Compagnie Maritime Belge* [supra] p. 328)

Before *Dole* v. *Dow* Section 1401 CPLR was, and still survives in New York State as, the only basis for contribution.

If there were any doubt as to whether the holding in *Dole* v. *Dow* was directed to indemnification as distinguished from contribution, *Rogers* v. *Dorchester Associates* (June, 1973) 32 N.Y. 2d 553, 564 resolved the question in favor of indemnity.

The impact of *Dole* v. *Dow* in the field of automobile accident litigation is that, whereas formerly indemnity

could not be obtained by one motor vehicle owner or driver against another motor vehicle owner or driver involved in a collision since both would then be active tortfeasors in *pari delicto* (*Anderson* v. *Liberty Fast Freight Co.*, 285 App. Div. 44), now such actions over may be pursued in New York State (*Sa[illegible]ies* v. *Hertz Corporation*, 70 Misc. 2d 449; *Wattecamps* v. *Artkraft Strauss Sign Co.*, 75 Misc. 2d 934).

Section 388 of the Vehicle and Traffic Law of the State of New York imposes an independent legal responsibility upon the owner for the proper and safe operation of his vehicle on the public highways by said owners, employees or operators driving the vehicle with the owner's permission. The United States admitted in its amended answer to the third party complaint after it had taken over for Robert Cooper and Robert Sheridan that it owned the Rambler automobile involved in the subject accident and that the operator of that car at the time was its employee (16a-17a, 66a). The third-party complaint herein alleges that the negligent operation of the Government vehicle by its operator caused plaintiff's accident (18a). While the United States denied this allegation (66a), it is submitted that the pleadings before the Court in this action spell out the admitted or controverted allegations of the breach of an independent duty owed by the United States, either in its own right or as the alter ego of Cooper and Sheridan, to the third-party plaintiffs which caused them to be cast in liability in whole or in part thereby to the plaintiff. This constitutes the foundation for a cause of action for indemnity by third-party plaintiffs against the United States and the persons it represents in this action according to the law of the State of New York. 28 U.S.C. 2674 provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances. Ac-

cording to 28 U.S.C. 1346 (b) the United States District Court, in the exercise of its exclusive jurisdiction in this type of case, is to try the action in accordance with the law of the place where the acts or omissions occur.

Accordingly, it is contended that there should be no question that the pleadings before the Court set forth substantive grounds for a claim of indemnity by the third-party plaintiffs against the United States and the only issue, then, is whether or not the United States is exempt from such a civil third-party action by virtue of 5 U.S.C. 8116 (c).

The Courts have held that Federal Law governs the interpretation and application of 5 U.S.C. 8116 (c) with consideration being given for instructional purposes to the existing state law on the same subject.

> "Determining the extent of the Federal Government's liability to third persons under FECA is a matter which requires interpretation of a federally created immunity, if any, rather than a state created immunity and as such it should be resolved as a matter of federal law. See *Newport Air Park* v. *United States,* 419 F. 2d 342, 346-347 (1st Cir. 1969). While examination of analogous practices under state workmen's compensation schemes, such as that of Pennsylvania may be instinctive in resolving this issue, the determination nevertheless remains as a matter of federal law." *Travelers Insurance Company* v. *United States,* 493 F. 2d 881, 883-884.

In its deliberations, the Court is respectfully requested to compare the almost exact wording of 5 U.S.C. 8116 (c) and Section No. 11 of the Workmen's Compensation Law of the State of New York.

The Courts of the State of New York have uniformly ruled that the New York State Workmen's Compensation Law presents no obstacle to a third person sued by an employee from impleading the employer for indemnification based upon the violation of an independent duty owed by the employer to the primary defendant (*Westchester Lighting Co.* v. *Westchester C.S.E. Corp.*, 278 N.Y. 175).

The Federal Courts have not hesitated in State law liability cases to afford the right of action for indemnification by a primary defendant against the third-party defendant even though the third-party defendant is the plaintiff's employer and is directly responsible to such plaintiff only in workmen's compensation (*Bounougias* v. *Republic Steel Corp.*, 277 F. 2d 726 [7th Cir. 1960]; *Whitmarsh* v. *Durastone Co.*, 122 F. Supp. 806; *Atella General Electric*, 21 F.R.D. 372, 375). Particularly is this material in those cases where the Federal Court so decided after evaluating the wording of the New York State Workmen's Compensation Law so similar to 5 U.S.C. 8116 (c) (see *Burris* v. *American Chicle Co.*, 120 F. 2d 218 (2nd Cir. 1941).

> "There is nothing in Section 29 of the Workmen's Compensation Law (dealing with an employee's action against a third person) which circumscribes the latter, in the event of a recovery against it, of taking advantage of whatever legal rights may then arise in its favor against the employer; it is to that section of the statute that the court must look for such asserted impediment, and none has been discovered." *Rappa* v. *Pittston Stevedoring Corporation*, 48 F. Supp. 911, 912.

The Federal Courts have similarly interpreted the meaning of 5 U.S.C. 8116 (c) as not prohibiting the de-

fendant, sued by an employee of the United States who incurred his alleged damages in the course of his employment, from bringing a third-party action for indemnity against the United States based upon the breach of an independent duty owed by the United States to the primary defendant (*Weyerhaeuser Steamship Company* v. *United States,* 372 U.S. 597 (1963); *Treadwell Construction Company* v. *United States,* 372 U.S. 772 (1963); *Wallenius Bremen* v. *United States,* 409 F. 2d 994 (4th Cir. 1969); *Travelers Insurance Company* v. *United States,* 493 F. 2d 881 (3rd Cir. 1974)).

In the face of the consistent Federal and State Court decisions holding that 5 U.S.C. 8116 (c) and the identical state statutes do not prohibit third-party actions for indemnity and despite the fact that under the law of the State of New York for the third-party plaintiffs here have a viable claim for indemnification against the United States, the third-party plaintiffs were denied their right to pursue that cause of action on the reasoning that there was no foundation therefor by way of a breach of an underlying contractual agreement between the United States and the third-party plaintiffs.

It is strenuously urged that this basis for a refusal of indemnification to the third-party plaintiffs in this action is contrary to the plain reading of 5 U.S.C. 8116 (c), the judicial interpretation and the spirit of sections 28 U.S.C. 2674 and 28 U.S.C. 1346 (b). In *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 549-550 (1951), the United States Supreme Court spoke out against litigation advocacy which attempts to torture the wording of those two statutes to evade the obvious intent of Congress in passing them. According to the existing law of the State of New York where the subject accident occurred, the third-party plaintiffs have a good third-party action for indemnity against the United States. The FECA does

not preclude such an action. The utilization of decisions prior to *Dole* v. *Dow* or indulgence in semantics to defeat that legitimate remedy does not serve the ends of justice.

This Court is respectfully requested to hold that the third-party complaint, when read with the amended answer of the United States and the plaintiff's complaint, states a valid claim for indemnity and that 5 U.S.C. 8116 (c) is not a proper defense thereto.

POINT II

If the appellants were not entitled to claim indemnification from the United States, they should be allowed contribution in some form as meets the ends of justice.

The third-party plaintiffs-appellants are only seeking on this appeal, as they were on the motion which gave rise to it, a determination that they have some legal recourse by way of a third-party action over against the third-party defendants (whose liability the United States assumed) for whole or part of any money judgment which may be rendered against them and in favor of the plaintiff based upon the culpability of Robert Cooper and Robert Sheridan in causing or contributing to the accident which is the subject of the plaintiff's action.

On 28 U.S.C. 1346 (b), 28 U.S.C. 2674 and the present law of indemnity in the State of New York as legitimately circumscribed by 5 U.S.C. 8116 (c), the appellants contend that they are entitled to pursue their remedy by way of indemnification. However, great length of legal reasoning was devoted in the opinion of the District Court upon which the judgment on appeal was entered to justify the denial to the third-party plaintiffs

of any right to contribution according to the pleadings before it. Succinctly, the District Court ruled that under 5 U.S.C. 8116 (c) the United States was not subject to a third-party action for contribution since it could not be sued directly by the plaintiff because he was its employee injured in the course of his employment. It is anticipated from the argument of the Government below that the emphasis upon contribution by the District Court was influenced by its belief that *Dole* v. *Dow* established a new standard of contribution and not indemnification. In its determination on the position of the third-party plaintiffs the District Court also held that they were not entitled to indemnification from the United States on the technical ground that there was no existing contractual relationship between them.

In effect, the third-party plaintiffs were thereby not only deprived of all recourse against the parties whose fault caused or greatly contributed to the plaintiff's accident, but third-party defendants and the Government were exonerated from any responsibility for their fault and the Government will realize the return of its workmen's compensation lien if the plaintiff proves the slightest negligence against the appellants. In addition, the plaintiff is thereby awarded a double recovery—civilly and in workmen's compensation.

As related in *Carr* v. *United States*, 422 F. 2d 1007, 1010, (1970), prior to the enactment of 28 U.S.C. 2679 (b) the driver of a Government vehicle was personally liable for the results of his own negligent acts and a co-employee could sue him civilly for damages caused by such negligence. The Federal Employees Compensation Act apparently has no provision otherwise preventing one Government employee from suing another for injuries he inflicted while both are in the course of their employment. With the enactment of 28 U.S.C. 2679

the United States assumed the liability of its employees driving Government vehicles in the course of their employment. The *Carr* decision (p. 1009) tells that the "Driver's Act" was passed solely to relieve such motor vehicle drivers from the burden of carrying liability insurance. This legislation was, then, intended as a convenience for Government employees and not for any Government purpose. *Carr* (p. 1010), however, held that as between the Government and its employee plaintiff in an action pursuant to 28 U.S.C. 2679 (b), the United States had the affirmative defense of 5 U.S.C. 8116 (c).

In the instant litigation the Government initially stepped into the shoes of the third-party defendant, its driver, for his negligent operation of the Government's vehicle under 28 U.S.C. 2678 (b). That was the only basis for giving the United States standing in this action. However, once it was in the action only as the alter ego of that driver, who did not have the defense of workmen's compensation, the Government assumed its other role as the injured employee plaintiff's employer in order to set up the defense under 5 U.S.C. 8116 (c) against the defendants third-party plaintiffs and so insulated itself against any recovery by them against it. Thereby, the Government, after taking over for its driver and his supervisor, would deprive the defendants third-party plaintiffs of any contribution against itself despite the culpability of the third-party defendants whose liability is assumed. To top the entire matter, United States now stands ready to recoup its compensation lien under 5 U.S.C. 8132 from any money judgment recovered against the defendants third-party plaintiffs by the plaintiff. In an analogous situation in *United States* v. *Yellow Cab* (supra 551-552) the Court rejected such one-sided application of the law.

In the first place, it is strongly contended that the United States does not appear as third-party defendant

in this action as the plaintiff's employer but as the substitute party answering for the negligent operator of its car. In the *Carr* decision the Court stated that in suits between employees of the Government the advantages of the assumption of the employee driver's liability by the United States afforded by 28 U.S.C. 2678 (b) far outweighs the disadvantages to the occasional co-employee injured by the negligent Government motor vehicle operator since that co-employee would still have recourse to workmen's compensation for his damages. However, this convenient statutory arrangement for Governmental employees makes no provision one way or the other about protecting the rights of the independent motor vehicle operator, as in this case, who is sued by the government employee passenger injured in a collision caused for the most part by the fellow employee of the plaintiff, the driver of the Government car. The provisions of 28 U.S.C. 2674 and 28 U.S.C. 1346 (b) have not been abrogated by 28 U.S.C. 2678 (b). Here, by the Government's artful implementation first of 28 U.S.C. 2678 (b) whereby it was substituted only as and for the driver of its vehicle, then by asserting its unrelated role as employer of the plaintiff, completely divorced from its status in which the Government is a party in this action, and by later claiming the right to interpose the defense of 5 U.S.C. 8116 (c), the United States seeks to denude the third-party plaintiffs of all of their rights under 28 U.S.C. 2678 and 28 U.S.C. 1346 (b). These third-party plaintiffs did not sue the United States as the employer of the plaintiff for indemnity and/or contribution. They sued the driver and the plaintiff. The fact that the United States assumed the liabilities of these third-party defendants did not give it the right to unilaterally expand its role and make itself both the employer and the employee third-party defendant so as to defeat the third-party plaintiff's cause of action.

By this juxtapositioning of the statutes, the Government would not have this Court legitimately substitute it as the co-employee of the plaintiff as the statute intends, but would have that co-employee declared immune from the legal consequence of his own fault for which the FECA affords him no exemption. If the Government's reasoning is allowed, the United States will not be assuming the liability of its employee as 28 U.S.C. 2678 (b) intends, preserving all rights of independent third-parties to any claim they would have had against the offending driver, but it will thereby also divest itself of any of the consequences of that assumption of the employee's liability. Thus, the Government has exempted itself from the waiver of immunity to third-person provisions mandated in 28 U.S.C. 2678 and 28 U.S.C. 1346 (b).

In view of the circumstances under which this suit was brought, to hold that the third-party defendants are first not entitled to indemnification under New York State Law and then, by marrying the Driver's Act with the exclusion provision of the Federal Workmen's Compensation Act, to hold that they are also denied a claim of contribution would visit a real injustice upon the third-party plaintiffs and effect an end which is patently contrary to any reasonable legislative intent.

The Federal Courts have never permitted the purpose of the law of contribution to be defeated by slavish adherence to the letter of 5 U.S.C. 8116 (c), especially where it is, at most, only tangentially related to the issues or the standing of the United States in an action. In *Weyerhaeuser Steamship Company* v. *United States,* 372 U.S. 597 (1963) and in *Treadwell Construction Company* v. *United States,* 372 U.S. 772 (1963) where contribution was the only viable recourse of a party plaintiff, the Court has allowed a sharing of personal injury damages between the parties to a vessel collision even though it varied with

the technical interpretation of 5 U.S.C. 8116 (c) in order to effectuate substantial justice to all parties.

In the Fourth Circuit in *Wallenius Bremen G.m.b.H.* v. *United States,* 409 F. 2d 994 (1969) the Court followed this precedent.

In the Third Circuit in *Travelers Insurance Company* v. *United States,* 493 F. 2d 881 (1974) the Court of Appeals reversed the District Court (331 F. Supp. 189) on its holding that contribution was compatible with 5 U.S.C. 8116 (c) only because the Appellate Court found that contribution was not the sole remedy and that the aggrieved defendant in fact had a good claim in indemnity on the theory of breach of an independent duty.

In the District of Columbia Circuit in *Murray* v. *United States,* 405 F. 2d 1361 (1968), where the third-party plaintiff was relegated only to contribution on his pleadings against the third-party defendant employer of the plaintiff, the United States Court held that, since the blameworthy third-party defendant employer could not be sued directly by the plaintiff, the responsibility of the third person sued by the plaintiff was limited to one-half of the plaintiff's total damages as a fair and proper adjustment, considering that the plaintiff had already collected his employer's share of the damages in workmen's compensation. This decision was confirmed as the law of that Circuit in *Dawson* v. *Contractors Transportation Corp.,* 467 F. 2d 727 (1972).

If the Government's argument were to be accepted, to the extent that the third-party plaintiffs-appellants are not entitled to seek indemnity here, either because *Dole* v. *Dow* recites a rule of contribution and not indemnity, or because there was no underlying independent contractual relationship existing between the United States and the third-party plaintiffs, and that the United States were not to be subject to contribution since it cannot be named

as a direct defendant in the plaintiff's suit, the third-party plaintiffs are left without any remedy against the tort-feasor whose negligence and breach of duty caused or greatly contributed to the accident, thereby imposing upon the third-party plaintiffs the unfair obligation of paying the full damages ensuing from it. In this circumstance the obvious injustice to the third-party plaintiffs cries out for judicial reconciliation of the interpretation of the applicable statutes to effectuate their real intent and not an artifiicial saving to the United States.

Accordingly, if by some reasoning the third-party plaintiffs-appellants are relegated by the existing laws of the State of New York to the single remedy of contribution and they would otherwise be precluded from such relief under the construction offered by the Government and adopted by the District Court, this Court is respectfully requested to consider the allegations in the pleadings together with the law in conjunction with the format of judicial reasoning exhibited in the aforesaid cited cases to avoid depriving these appellants of any remedy against the culpable real third-party defendants in this action.

CONCLUSION

The judgment appealed from should be reversed and an order should be entered entitling the appellants to pursue a claim for indemnification or contribution under whatever qualifications to this Court may be deemed just and proper.

Respectfully submitted,

LARKIN, WRENN AND CUMISKY
Attorneys for Defendants and Third-Party Plaintiffs-Appellants
Office & P. O. address
11 Park Place
New York, New York

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Attorney for